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No. 90-1857

# In the Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF YONKERS, NEW YORK, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in ruling that petitioner's appeals from orders enforcing its obligation to provide public housing sites were barred by a provision of an earlier consent decree that prohibits any subsequent appeals from orders relating to that obligation.

2. Whether the district court abused its discretion when it ordered petitioner to transfer title to the housing sites to the public housing developer without retention of a right of reverter that would return title to petitioner if the sites were not used for public housing.

3. Whether the district court followed proper procedures in entering the orders in question.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The petition seeks review of the decisions of the court of appeals in two cases, the docket numbers of which in the Second Circuit were 90-6257 and 91-6022. The opinion of the court of appeals in No. 90-6257 (Pet. App. A53-A59) is reported at 927 F.2d 85. The order of the court of appeals dismissing the appeal in No. 91-6022 (Pet. App. A60-A62) is unreported. The orders of the district court (Pet. App. A30-A37, A50-A52) are unreported.

### JURISDICTION

The judgments of the court of appeals were entered on March 4, 1991 and March 20, 1991. Pet. App. A53, A62. The petition for a writ of certiorari was filed on May 31,

1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case presents another appeal from the residential segregation litigation involving the City of Yonkers, which this Court considered in *Spallone* v. *United States*, 110 S. Ct. 625 (1990). This case involves orders the district court issued regarding petitioner's obligation to convey clear title to sites on which subsidized housing is to be built pursuant to remedial orders previously entered in this litigation. The court of appeals affirmed the orders.

1. After a lengthy trial, the United States District Court for the Southern District of New York issued a decision in November 1985, holding petitioner liable for a pattern and practice of intentional racial discrimination in the selection of sites for public and subsidized housing, in violation of the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act of 1968 (Title VIII of the Civil Rights Act of 1968), 42 U.S.C. 3601 *et seq. United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1289-1376 (S.D.N.Y. 1985). Following remedial proceedings, on May 28, 1986, the district court entered its Housing Remedy Order (HRO). *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986) (Pet. App. A1-A17). In December 1987, the court of appeals affirmed the district court's liability and remedy rulings "in all respects." *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

In Part IV of the HRO, the district court found that petitioner had "previously committed itself to provide acceptable sites for 200 units of public housing * * * but ha[d] failed to do so." Pet. App. A9. The HRO required petitioner to propose public housing sites for the 200 units

within 90 days of entry of the HRO; if petitioner did not do so, the sites would be selected by the district court from among sites designated in the HRO and proposed by the United States and plaintiff-intervenor NAACP. *Id.* at A11-A12. Although petitioner did not secure a stay pending appeal, it refused to comply with Part IV of the HRO during the year and a half that its appeal of the district court's orders was pending in the Court of Appeals. See *Spallone* v. *United States*, 110 S. Ct. 625, 629 (1990).

In January 1988, after the court of appeals affirmed the liability and remedy orders, the parties negotiated and the district court entered an order setting forth the actions petitioner would take to comply with Part IV of the HRO. See First Remedial Consent Decree in Equity, Pet. App. A21-A28 (Consent Decree). In Section 1 of the Consent Decree, petitioner "acknowledge[d] its continuing commitment to the construction of the 200 units of public housing." *Id.* at A21. In Section 2, it "agree[d] to provide" seven specific sites for such housing. *Id.* at A22. Three of the sites were school properties owned by petitioner; the other four were privately owned. Sections 4 and 5 of the Consent Decree required petitioner to acquire title to the privately owned sites either through negotiations with the owners or by exercise of the power of eminent domain. *Id.* at A23. Section 9 required petitioner to "fully and in good faith cooperate" in the public housing development process. *Id.* at A24. In Section 10, petitioner agreed that, "to the extent that it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the [district court's liability decision] or of any subsequently entered decree." *Id.* at A25.

On March 21, 1988, petitioner moved to amend the Consent Decree to strike Section 10 so that petitioner could seek review in this Court of its public housing obligations.

91-6022 C.A. App. 51-98.[1] Petitioner asked the district court to "exercise its discretionary equitable power" to quiet intense public opposition to the Consent Decree in Yonkers (*id.* at 51-53, 59-62), and argued that modification would further the goals of the Decree (*id.* at 62-69).[2] Petitioner did not contend that Section 10 improperly intruded upon the authority of appellate courts to oversee the district court's injunctive orders. The district court denied petitioner's motion. *Id.* at 161-179. Soon thereafter, petitioner abandoned all pretense of compliance with the Consent Decree and HRO. It moved unsuccessfully to vacate the Consent Decree in its entirety (*Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 860-861 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989)), refused to participate in the process of designating an alternate public housing site (858 F.2d at 860, 872-873; 90-6257 C.A. App. 79-85, 89-91), and refused to carry out its obligations under the Consent Decree regarding the plan to promote the development of additional

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[1] Citations to "91-6022 C.A. App. ____" refer to pages in the Joint Appendix in the court of appeals in No. 91-6022. Citations to "90-6257 C.A. App. ____" and to "90-6257 C.A. S.A. ____" refer to pages in the Joint Appendix and the Supplemental Appendix, respectively, in the court of appeals in No. 90-6257. Citations to "91-6098 C.A. App. ____" refer to pages in the Joint Appendix in the court of appeals in No. 91-6098.

[2] In support of its motion, petitioner offered to return nearly $30 million in federal Community Development Block Grant funds—which it had received only upon its promise to "provide acceptable sites for 200 units of public housing" (see Pet. App. A9)—if its public housing obligation was overturned. 91-6022 C.A. App. 78.

subsidized housing in Yonkers (*Spallone*, 110 S. Ct. at 629-631).[3]

2. By 1990, despite petitioner's efforts to impede implementation of the Consent Decree, the public housing development process for the first 142 units on five sites was approaching its final stages. Deluxe Development of New York, Inc. (Deluxe) had been selected as the developer, review of the development plans was complete, and the only steps necessary for construction to begin were the transfer of title to the sites from petitioner to Deluxe and the execution of the contract of sale by Deluxe, the Municipal Housing Authority, and the Department of Housing and Urban Development. See 91-6022 C.A. App. 228-230.[4] At this point, petitioner began taking new steps to frustrate implementation of the decree. In March 1990, the City Council adopted resolutions asking HUD to reconsider the construction of the public housing and directing the City Manager not to transfer the public housing sites to Deluxe. See 91-6098 C.A. App. 913-925. And, in a case in which it was nominally a defendant, petitioner joined with a private plaintiff in (unsuccessfully) seeking an injunction

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[3] Petitioner's refusal to comply with the Consent Decree is described in more detail in the court of appeals' decisions in *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d at 859-860, 865, and *United States* v. *City of Yonkers*, 856 F.2d 444, 449-452 (2d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (No. 88-855), cert. granted, 489 U.S. 1064 (1989) (Nos. 88-854, 88-856, & 88-870), rev'd, *Spallone*, v. *United States*, 110 S. Ct. 625 (1990); and in the United States' prior submissions to this Court, U.S. Br. 11-18, *Spallone*, Nos. 88-854, 88-856, 88-870; U.S. Br. in Opp. 4-5, *Yonkers Racing Corp.* v. *City of Yonkers*, No. 88-1029.

[4] It is contemplated that the Municipal Housing Authority would acquire the housing from Deluxe after Deluxe completes construction. HUD had agreed to fund the public housing in a 1984 consent decree with the NAACP. See Pet. App. A9.

to block construction of the public housing on environmental grounds. See *D'Agnillo* v. *United States Dep't of Housing & Urban Dev.*, 923 F.2d 17 (2d Cir.), cert. denied, No. 90-7664 (June 28, 1991).

On July 13, 1990, the district court held a conference of all interested parties in an attempt to resolve all outstanding issues so that construction could proceed promptly thereafter. 90-6257 C.A. App. 276-315.[5] On July 24, 1990, following submission of a proposed order by the United States, the court entered an order that required petitioner to transfer title to the public housing sites to Deluxe "immediately prior to signing of the turnkey contract of sale." Pet. App. A33. If petitioner failed to comply, its title to the properties would be divested and title would be vested in Deluxe, pursuant to Rule 70 of the Federal Rules of Civil Procedure. *Id.* at A33-A34.[6] To deal with a concern expressed at the conference that the condemnations by petitioner may have left some of the land restricted in a manner inconsistent with the construction of public housing (90-6257 C.A. App. 303-307), the July 24 Order further required petitioner to "condemn any private easements or covenants inconsistent with the use of any of the above-named properties for public housing," and to convey title

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[5] The court explained:

> We'll continue this conference as long as necessary, but it should be understood that when this conference is over, every issue of which anybody is aware which might in any way be a stumbling block to the signing of the contract next week is to be aired, and that I will deem to have been waived any objections which are not articulated in this conference.

90-6257 C.A. App. 283.

[6] Counsel for petitioner had suggested proceeding under Rule 70 during a conference with the court on March 21, 1990, as an alternative to holding petitioner in contempt (3/21/90 Tr. 18-21).

to Deluxe free and clear of any such defects. Pet. App. A34.[7]

On July 30, petitioner, represented by new counsel, moved for reconsideration of the July 24 Order (90-6257 C.A. App. 190-197). In its motion and during a conference on July 31 (*id.* at 237-275), petitioner raised two main objections. First, petitioner contended that it should be permitted to retain a right of reverter to enable it to reclaim the public housing sites in the event that they were not used for construction of public housing (*id.* at 240-251). As an alternative, petitioner asked that, once it had transferred title, it be relieved, *pro rata*, from its public housing obligations (*id.* at 253-254, 256-259, 342). Second, petitioner proposed a different procedure for dealing with defects in title to the sites (*id.* at 261-273, 339-342). Under petitioner's proposal, the MHA, HUD, and Deluxe would provide petitioner with a list of title defects (*id.* at 339). Petitioner could contest the need to remove any such defects, but would still be required to extinguish all those found by the court to be inconsistent with the use of the sites for public housing (*id.* at 339-340). Title to the sites would not be transferred to Deluxe (and therefore construction of the housing would not begin) until this process was completed (*id.* at 340). The court denied petitioner's motion as to the right of reverter and the procedure for clearing title (*id.* at 251-253, 269), but agreed that the specific steps petitioner was to take to clear title would be spelled out in a court order (*id.* at

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[7] Contrary to petitioner's assertion (Pet. 7), the title obligations were not imposed by the court *sua sponte*. As petitioner's motion for reconsideration of this order acknowledged, see 90-6257 C.A. App. 194, the problems with title and petitioner's obligations had been discussed during the July 13 conference (see *id.* at 303-307), at the end of which the court had asked counsel for the United States to prepare a proposed order consistent with the conference, *id.* at 313-314. The court modified the proposed order only by adding paragraph 3(A). See *id.* at 187.

272-273). On August 2, the court entered such an order, which required petitioner, *inter alia*, to remove restrictive covenants on the Whitman site that restricted its use to single-family detached housing, to "demap" a proposed street on the Helena site, and to remove any other such restrictions that might be found (*id.* at 219-220).

At a hearing on November 8, petitioner's attorney informed the court that it was estimated that it would cost $275,000 and take eight to twelve months simply to identify the parties in interest in preparation for condemning the covenants on the Whitman site (91-6022 C.A. App. 617-618). The court reiterated that it was petitioner's responsibility "to deliver free and clear title" to the public housing sites (*id.* at 618; see *id.* at 616), and gave petitioner the option of complying with this obligation in one of two ways. Petitioner could initiate condemnation proceedings to extinguish the covenants or it could "indemnify and save harmless HUD, [M]HA or anyone else should there be any damages or costs, including legal fees, incurred by virtue of any of these problems" (*ibid.*; see also *id.* at 622-629). The court described the covenants restricting use of the Whitman site to single-family dwellings as "ephemeral" and "nebulous" in light of the fact that the covenants had not troubled petitioner when it wished to build a school on the site (*id.* at 619, 622-623, 628). Finally, the court stated that neither the existence of the covenants nor the time and cost estimates of the title company could be used to delay further the construction of the public housing (*id.* at 619).[8]

On November 16, petitioner filed a motion, supported by 31 exhibits, for relief from the November 8 "order"

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[8] The concept of indemnification had been raised before the hearing, with notice to petitioner, both by counsel for the NAACP (see NAACP Br. in Opp. App. 1-3), and by HUD (91-6022 C.A. App. 315, 475).

(91-6022 C.A. App. 298-540).[9] At the hearing on this motion on November 29, petitioner acknowledged its responsibility to provide clear title to the sites (*id.* at 664-665) and expressed doubt that the Whitman covenants would present a serious risk, because the covenants did not appear on the title to the Whitman site itself (*id.* at 648-650, 656).[10] Petitioner nonetheless objected to its indemnification obligation, claiming that it impermissibly expanded petitioner's existing obligation "to just deliver clear and marketable title" (*id.* at 650). Petitioner suggested three alternatives: selection of an alternative to the Whitman site (*id.* at 658-659), delay of construction on that site (*id.* at 660-662), or construction of detached rather than townhouse units on that site (*id.* at 663-664).

The court rejected these alternatives because the questions of the sites and the type of housing to be built had long since been resolved (91-6022 C.A. App. 663-664).[11] The court once again stated that petitioner either could initiate actions to condemn the restrictive covenants, or could wait

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[9] The court had issued no written orders as a result of the November 8 hearing. Thus the court issued no order that would meet the requirements for entry of judgment set forth in Fed. R. Civ. P. 58. Nor did petitioner ask the court to do so, even though the court invited any of the parties to submit a proposed order if they believed it necessary (91-6022 C.A. App. 624).

[10] Petitioner stated in its motion papers that it had condemned the reversionary interest that was the basis of the restrictive covenants at Helena (91-6022 C.A. App. 308; see *id.* at 413-414), and petitioner's attorney made it clear at the hearing that the covenants affecting the Helena site were "not very serious" and "not real problems" in petitioner's view (*id.* at 655; see also *id.* at 648; 91-6022 C.A. App. 170-172).

[11] Because the identity of the sites and the type of housing had been specified in the Request for Proposals from developers (90-6257 C.A. S.A. 2-3), changing either at this late stage would have invalidated the entire RFP process and required that the project be rebid and thus delayed considerably.

and act if and when any claims were asserted (*id.* at 677). The court thus vacated paragraph 4 of the August 2 order (see *id.* at 255), which unconditionally had required petitioner to initiate such actions (*id.* at 687). On December 5, the court entered an order denying petitioner's motion for relief from the November 8 "order" (*id.* at 692).

On December 19, following submission of a proposed order by the United States and a response from petitioner,[12] the district court entered its order requiring petitioner to indemnify HUD and the MHA for any losses or expenses they might incur as a result of alleged title defects at the Whitman and Helena sites (Pet. App. A50-A52).[13]

3. On appeal, the court of appeals affirmed the July and August site transfer orders (90-6257 Pet. App. A53-A59), and dismissed petitioner's appeal from the indemnification order as barred by Section 10 of the Consent Decree (91-6022 Pet. App. A60-A62).[14]

In No. 90-6257, the court of appeals ruled, first, that petitioner's appeal was barred by Section 10 of the Consent Decree. Pet. App. A57. Rejecting petitioner's contention that Section 10 "bars only those appeals that challenge the City's basic obligation to provide sites," the court found that "by its terms, Section 10 also bars appeals from decrees

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[12] Petitioner errs in alleging (Pet. 12, 22 n.13) that this Order was entered *sua sponte*.

[13] The contract between Deluxe, the MHA, and HUD was signed on January 14, 1991. Construction began in the spring of this year and is now well underway; completion of the housing is expected by this fall.

[14] In its notice of appeal in No. 90-6257, petitioner appealed from the district court's July 24, July 31, and August 2 Orders (90-6257 C.A. App. 47-48). In its notice of appeal in No. 91-6022, petitioner appealed from all "orders" entered by the district court on November 8, November 16, November 27, November 29, and December 19 (91-6022 C.A. App. 689-691).

that 'relate[] to' the City's obligation" to provide sites. *Ibid.*[15] Thus, the present appeal was barred by Section 10. *Ibid.*

The court next ruled that, even if the appeal was not barred, the challenged orders should be affirmed on the merits. Pet. App. A57-A59. The district court's refusal to provide for a right of reverter was not an abuse of discretion because the federal courts had adequate equitable powers to deal with any problems that might arise in the absence of such a right, and because creating such a right would have delayed or jeopardized construction of the housing. *Id.* at A58. Nor did the district court abuse its discretion in refusing to provide petitioner with a *pro rata* release from its public housing obligations, because there were numerous ways in which petitioner still could impede construction. *Id.* at A58-A59. Finally, the court of appeals rejected petitioner's objections to the district court's orders relating to petitioner's obligation to provide clear title to the sites. Petitioner's challenge to the requirement that it identify and clear encumbrances prior to conveyance, the court of appeals found, was now moot, because that requirement had been vacated on November 29, and replaced

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[15] Petitioner misstates the court of appeals' holding. The court of appeals did not hold that Section 10 bars an appeal from "*any* matter involving the public housing" (Pet. 3), from "any district court order involving the public housing sites" (Pet. 12-13), or from "any order that 'relates to' the public housing sites" (Pet. 16). Rather, the court of appeals rejected an appeal from what it viewed as district court orders that rejected informal attempts by petitioner to modify its obligations. Thus, all the court of appeals has *held* is that petitioner cannot appeal district court orders that reaffirm petitioner's obligation. Furthermore, nothing in the Second Circuit's opinion addresses petitioner's capacity to appeal denial by the district court of a motion for modification of Section 10 to permit an appeal of a particular order; we concede that appeal of an order denying a motion to modify Section 10 itself would be proper.

with an obligation *either* to clear the encumbrances *or* indemnify subsequent owners from claims arising out of the encumbrances. *Id.* at A59. And petitioner's challenge to its indemnification obligations was rejected as "frivolous":

> To the extent that the City challenges, as a modification of its obligations, the requirement that it defend against any suits arising from defects in the titles it conveys, such challenge is frivolous. The City is obligated under the HRO "to provide *acceptable* sites for . . . public housing" (emphasis added). Sites that cannot be used for public housing because of title defects are, quite simply, not "acceptable."

*Id.* at A59 (footnote omitted).[16]

In No. 91-6022, after receiving petitioner's brief on the merits, the same panel of the court of appeals granted the United States' motion to dismiss petitioner's appeal from the indemnification order. That motion argued for dismissal on the ground that the appeal was barred by Section 10 of the Consent Decree.[17]

## ARGUMENT

The decisions below are correct. They do not conflict with any decision of this Court or any other court of appeals.

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[16] In its briefs and at oral argument in No. 90-6257, petitioner had challenged not only the site transfer orders entered in July and August 1990, but also the indemnification obligations discussed by the court on November 8, November 29, and in the December 19 order, which were the subject of petitioner's appeal in No. 91-6022. See 90-6257 City of Yonkers C.A. Br. 33-34 n.12; 90-6257 City of Yonkers C.A. Reply Br. 19-20, 25, Addendum A, Addendum B.

[17] Because the court of appeals did not issue an opinion, it is not clear whether the court of appeals dismissed the appeal because it was barred by Section 10 of the Consent Decree, as the United States argued in its motion, or because the challenge was meritless, as the court had explained in its opinion in No. 90-6257, Pet. App. A59.

Indeed, the issues presented in this fact-bound case are peculiar to the *Yonkers* litigation and, we may hope, likely to arise only with rarity outside that context. Accordingly, review by this Court is not warranted.

1. Petitioner first contends that the court of appeals erred in concluding that Section 10 of the Consent Decree bars petitioner's appeals from the district court's orders, arguing both that the court of appeals' reading is contrary to the plain language of the decree (Pet. 14-17), and that district courts do not have authority to enter such a decree (Pet. 17-20). The question whether parties to a consent decree can bargain away one party's right to appeal any subsequent order of a district court has been raised by petitioner for the first time at this late stage of the litigation. Accordingly, because the question was neither presented to nor decided by the court of appeals, it is not properly before this Court. See, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

The only question properly before this Court with regard to the appealability issue is whether the court of appeals correctly interpreted the language of this particular consent decree. Petitioner's contention that the plain language of the decree conflicts with the interpretation of the court of appeals is meritless. The decree expressly states that petitioner "will seek no further appellate review," not only of the underlying liability decision, but also "of any subsequently entered decree," to the extent "it relates to the City's obligation to provide sites for the placement of 200 units of public housing." Pet. App. A24. There can be no question that this appeal challenges "subsequently entered decree[s]" that "relat[e] to the City's obligation to provide sites for the placement of 200 units of public housing."

Accordingly, the plain language of the decree supports the court of appeals' interpretation.[18]

Nor is there any merit to petitioner's various suggestions (Pet. 12-13, 16-18) that the opinion of the court of appeals will leave petitioner unable to challenge future extensions of the Consent Decree, however onerous. The obligations in question in this case involve nothing more than restatement of petitioner's obligation under the Consent Decree to provide acceptable sites: petitioner has not provided the sites if it retains a burdensome right of reverter that as a practical matter might make the project unmortgageable, see 90-6257 C.A. App. 246-247; it has not provided acceptable sites if it provides the sites subject to restrictive covenants barring the construction of public housing. Accordingly, this case does not present an extension or modification of the decree or newly imposed obligations, so the propriety of appeals of such orders is not properly presented here.

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[18] Nor does "the context of the litigation at the time of entry of the decree" (Pet. 14) support petitioner's contention that Section 10 was meant to apply only to its underlying obligation to provide the sites. During the year before entry of the Consent Decree, petitioner initiated five different appeals (docketed in the court of appeals under Nos. 87-6074, 87-6138, 87-6176, 87-6284, and 87-6292) from district court orders relating to its obligation to provide sites for public housing. Petitioner agreed to the dismissal of each of these five appeals either just before or just after entry of the Consent Decree, but continued to prosecute another appeal (No. 87-6070) that involved another aspect of its remedial obligations. Further, in the two and a half years following entry of the Consent Decree, petitioner chose not to appeal at least four district court orders relating to its obligation to provide public housing sites, apparently because of the Consent Decree. Petitioner began appealing orders relating to that obligation only in 1990 after it retained new counsel, who had not been involved in the Consent Decree negotiations. See 91-6022 Decl. of Linda Thome in Support of United States' Mot. to Dis. 6-7.

In any event, despite its ruling on appealability, the court of appeals went on to address the merits.[19] Review of the appealability issue by this court is unwarranted because the judgments below may be sustained regardless of the correctness of the appealability ruling. See pp. 15-16, *infra*.

2. Petitioner next argues (Pet. 20-22) that the district court abused its discretion in declining to allow petitioner to convey the sites subject to a right of reverter that would cause title to revert to petitioner if the sites were not used for public housing. The petition offers no reason to believe that the district court's exercise of its discretion on this narrow point raises any significant question of general import. Moreover, the district court's decision is correct. In light of petitioner's continued resistance to the Consent Decree process, the district court reasonably concluded that any such condition would only encourage opponents of the housing project to attempt to cause the development to fail so that title would revert to petitioner. See 90-6257 C.A. App. 252-253.

3. Finally, petitioner argues (Pet. 22-24) that the district court's entry of the orders in question constituted improper modification of the Consent Decree without compliance with the procedures set forth in Fed. R. Civ. P. 60(b). Petitioner offers no reason to believe that the district court's actions in this regard raise a legal issue of general importance. Moreover, petitioner's contention is meritless. First,

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[19] The court of appeals expressly addressed and rejected petitioner's arguments on the merits in No. 90-6257. See Pet. App. A57-A59; pp. 12-13, *supra*. In No. 91-6022, it is unclear whether the court below considered the merits of petitioner's appeal, see note 17, *supra*, but the opinion in No. 90-6257 adequately responded to petitioner's contentions in No. 91-6022.

the orders were not modifications of the consent decree. As the court of appeals concluded, Pet. App. A57, the substance of these orders was to bar petitioner's efforts to avoid complying with the Consent Decree; the orders did nothing more than reject additional delaying tactics at the last instant. Nor was there any irregularity about the proceedings surrounding entry of the court's orders. Contrary to petitioner's contentions, none of the court's orders were entered *sua sponte*. The July 24 and December 19 Orders were proposed by the United States, with notice to petitioner, and followed one or more hearings on the subjects dealt with therein. The July 31 and August 2 Orders followed a detailed submission by petitioner and a hearing at which the issues were fully aired.

Nor did the court deny petitioner the right to present evidence; to the contrary, petitioner never requested an evidentiary hearing. Indeed, petitioner submitted and the court received affidavits and documentary evidence with petitioner's July 30 and November 16 motions, as well as at the November 29 hearing. As discussed above, the issues dealt with in the orders under review were discussed at no less than four different hearings and conferences, on July 13, July 31, November 8, and November 29, 1990. This claim merits no further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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